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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 690

GENEE M. CARREIRO, IRENE G. CARREIRO, individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and WELLS FARGO BANK,
Petitioners,

vs.

PHYLLIS BAEKGAARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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GENEE M. CARREIRO, IRENE G. CARREIRO, individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and WELLS FARGO BANK,
Petitioners,

vs.

PHYLLIS BAEKGAARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioners, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 3, 1956 reversing the judgment of the United States District Court for the Northern District of California, Southern Division.

I. OPINIONS BELOW.

The opinion of the Court of Appeals, filed on October 3, 1956, is appended to this petition as Appendix A (infra pp. i-xv). No opinion was made or filed by the District Court.

II. JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was dated and entered on October 3, 1956. A petition for rehearing was denied on December 8, 1956 (Appendix B, infra p. xvi). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. The District Court had jurisdiction under 28 U.S.C., Sections 1338 and 2361.

III. QUESTIONS PRESENTED.

(A) Where the primary beneficiary of life insurance policies waives her right to the proceeds of the policies by a property settlement agreement with the insured, and the policies provide that the secondary beneficiary is to take the proceeds if the primary beneficiary predeceases the insured, and the insured dies before the primary beneficiary without having changed the beneficiary provisions of the policies:

(1) Did California law govern the lower Court where the face amounts of the policies were payable at the home office of the insurance company at Boston, Massachusetts, and Section 1646 of the Civil Code of California provides that: "A contract is to be inter-

preted according to the law and usage of the place where it is to be performed."

(2) If California law does apply, did the lower Court commit error, where, in California, the law of contracts governs the rights of beneficiaries to contracts of insurance, and the secondary beneficiary was awarded the proceeds in spite of the fact that the contingency to her becoming eligible to take never occurred?

(3) If California law does apply, did the lower Court commit error in failing to hold, or even consider the question, that the insured made a gift back to the primary beneficiary by not changing the beneficiary clause of the policy, where there is applicable California authority to support such a holding?

(B) Did the opinion in this case modify the earlier case of *Beck v. Downey,* 9 Cir. 191 F. 2d 150 and 198 F. 2d 626, or are there now two cases in conflict within the same circuit?

IV. STATUTES INVOLVED.

California Civil Code, Section 1646.

A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

California Civil Code (Deering, 1949) page 290.

V. STATEMENT OF THE CASE.

This action arose out of conflicting claims to the proceeds of three life insurance policies issued by the New England Life Insurance Company, on the life of Dr. George S. Carreiro, deceased, a resident of California at the time of death. The action was filed by New England Mutual Life Insurance Company, a Massachusetts corporation, as an action in interpleader under Section 1335 of Title 28, United States Code.

The issue in the case is "How shall the insurance benefits be awarded as to three women and as to the assured's estate?"; Genee M. Carreiro was the first and divorced wife of the assured and a citizen of California. Irene G. Carreiro was his second wife and a citizen of California; Phyllis Baekgaard was assured's daughter and a citizen of Illinois. Wells Fargo Bank & Union Trust Company (a California Corporation) intervened as the executor of the last will and testament of the assured.

Dr. Carreiro and Genee M. Carreiro were married in 1927 and Phyllis Irene Carreiro, now known as Phyllis Baekgaard, was the sole issue. Genee M. Carreiro is the primary beneficiary of the life insurance policies described in this litigation. In the event of her death before that of the assured, his daughter Phyllis was designated as the secondary beneficiary. In two of the policies, if both primary and secondary beneficiaries predeceased George Carreiro, proceeds were to be payable to the executor of his will. In the third policy, the assured's executor was secondary beneficiary as to part of the proceeds. In August,

1951, the doctor and Genee entered into a written property settlement, which provided in part as follows:

> "Sixth. The Husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claim of the wife thereto.
>
> "Seventh. (in part) The parties shall, at any time or times hereafter, make and execute and deliver any and all further or other instruments, papers or things as the other of said parties shall require for the purpose of giving full effect to these presents and the covenants, provisions and agreements thereof."

After making this agreement the doctor and Genee were divorced. Later the doctor married Irene and died one year thereafter, without having changed the beneficiaries of the policies in question and without having changed his last will and testament wherein Genee was named as a residuary legatee and executrix. Genee, the primary beneficiary, survived the assured.

On September 6, 1951, the insurance company directed a letter to Dr. Carreiro which stated as follows:

> "We wish to thank you for forwarding to us a certified copy of the Property Settlement Agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent record at the home office and we can now consider that Mrs. Carreiro has no further community property interest in the policies.
>
> If you wish to make any changes in the beneficiary arrangement please advise and forms will

be prepared for your signature. We note that we are holding all of your policies with the exception of policy No. 842502, which is presently assigned to the bank."

The insurance policies which are the subject of this action provide on the first pages thereof as follows: "New England Mutual Life Insurance Company of Boston agrees to pay at its home office in Boston, Massachusetts, on receipt of due proof of the death of the insured, George S. Carreiro, the face amount of $..... to the beneficiary * * *."

Upon certain occasions prior to the execution of the aforesaid property settlement agreement Dr. Carreiro had signed change of beneficiary forms with the insurance company in question incident to borrowing certain sums of money (55).

The lower Court concluded that at the death of George Carreiro he had manifested by conduct or otherwise an affection and desire to benefit four persons, namely, his first wife, Genee Carreiro; his daughter, Phyllis Baekgaard; his second wife, Irene Carreiro; and his father, John J. Carreiro (57). The Court further concluded that the evidence placed before the Court was of such an inconclusive and contradictory nature that the invocation of principles of equity in requiring an equal division of the proceeds share and share alike was fit and proper (58).

Therefore the Court concluded that equity and justice would be best served by rendering a judgment under the terms and provisions whereof all of the proceeds of the policies would be equally divided

between the four persons, namely the first and second wives, the daughter, and the estate wherein the father had a $5,000 specific bequest.

VI. ARGUMENT.

THE OPINION OF THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF STATE LAW ERRONEOUSLY AND IN CONFLICT WITH APPLICABLE STATE LAW. THE OPINION WILL BE OF NATIONAL INTEREST BECAUSE THERE IS NO REPORTED CASE IN POINT IN ANY OF THE FEDERAL OR STATE COURTS.

The holding of the lower Court presents serious questions involving the right of an assured to designate who he wants as beneficiary of his insurance, and the manner, mode and conditions of their taking. It poses the question: Can a Court disregard the plain language of a contract, and substitute its own terms in place of clear and express language used by the assured?

CALIFORNIA LAW DOES NOT GOVERN THIS CASE.

The Court of Appeals had no doubt that California law ruled this case and treated this issue, which is the crux of the case, in a footnote. In that footnote the Court of Appeals cited as its principal authority the case of *Ostroff v. New York Life Ins. Co.*, 104 F. 2d 986, and misstated the rule involved. The Court of Appeals in its opinion (footnote 3, page 8) states that the *Ostroff* case stands for the proposition "that California law was applicable where in ordinary course the repeated payments of premiums, constitut-

ing by far the greater number of performances of its terms, are to be performed in California." Actually, the rule of the *Ostroff* case is in 104 F. 2d at 989, and is as follows:

> "Without deciding what law would control the interpretation of the incontestability clause if the contract were entirely to be performed in New York, WE HOLD that since the policy is to be performed both in California and New York, and the case concerns the making and not the performance of the contract, the law of California, the place of making of the contract, controls."

After erroneously stating the rule of the *Ostroff* case, the Court of Appeals stated that this case "is similar to the Ostroff case". In the instant case the benefits were payable at the home office of the company in Boston, Massachusetts. Although the opinion of the Court of Appeals states that one of the policies in question was delivered in California, there is nothing in the record to indicate where the policies were delivered or where the premiums were paid. But the record does indicate that when the assured cancelled a policy the check came from the home office in Boston (R-72).

Had the Court of Appeals followed Civil Code, Section 1646, ("A contract is to be interpreted according to the law and usage of the place where it is to be performed") it would not have erred. Here, the benefits were payable at the home office in Boston, Massachusetts, and the premiums were payable at the home office in Boston, Massachusetts, or to any authorized agent. Obviously, the contract was *to be* per-

formed in Boston. The lower Court should not have concerned itself with surmisal as to where it might have been performed. Premiums might have been paid to any agent whether he was in French Equatorial Africa or at the North Pole. We are led to absurdities if we consider where premiums may have been paid to a company agent.

Two California decisions[1] are cited by the Court of Appeals (in the same footnote) as authority for the proposition that California law governs this case. Neither case is in point because both are distinguishable as being factually different. In both of those cases the insurance company paid benefits to the assured in California for a number of years and then attempted to cancel the policy on the ground that the assured had made misrepresentations in the application. Although premiums and benefits were *to be* paid at the home office of the insurance company in New York, among other things, the Court held that by paying benefits in California for a number of years the insurance company waived the right to insist that New York law applied. There is no factual reason for such a waiver in this case, so neither case is in point.

IF CALIFORNIA LAW DOES APPLY, THEN THE COURT OF APPEALS ERRED IN NOT FOLLOWING APPLICABLE DECISIONS.

Two cases are cited by the lower Court as its authority to award the proceeds to the secondary

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[1] *Braun v. New York Life Ins. Co.*, 115 P. 2d 880, 46 Cal. App. 2d 335; *Blair v. New York Life Ins. Co.*, 104 P. 2d 1075, 40 Cal. App. 2d 494.

beneficiary in spite of the fact that condition precedent to her taking never occurred. One is a California decision (*Beck v. West Coast Life Insurance Co.*, 38 Cal. 2d 643, 241 Pac. 2d 544, 26 A.L.R. 2d 979) and the other is from Florida (*Carter v. Carter,* 88 So. 2d 153). If California law is controlled, then the Florida decision is not applicable and will not be discussed.

The *Beck* case dealt with the unusual problem of what to do with the proceeds of a life insurance policy where the primary beneficiary murdered the insured, and the contingent beneficiary was not related to the murderer, and was living at the time of the murder. Should the Court give the proceeds to the contingent beneficiary or the estate of the insured? In awarding the proceeds to the contingent beneficiary the Court reasoned that the murderer could not defeat the rights of a third person by his own wrong. At page 647 the Court said:

> "The rule that prevents his profiting by his own wrong should not be involved in such a way as to prejudice the rights of the alternative beneficiary. In a word it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights."

California will not allow the primary beneficiary to benefit by his own wrong. What would that Court have done in the *Beck* case if the contingent beneficiary were the parent or child of the murderer? Certainly the estate would have been awarded the

proceeds. So it is apparent that the *Beck* case is a hybrid in the law whose rule is limited to its own facts.

THE LAW OF CONTRACTS GOVERNS THE RIGHTS OF BENEFICIARIES TO CONTRACTS OF INSURANCE IN CALIFORNIA.

California follows the general rule that an insurance policy

> "being a voluntary contract, the parties may make it on such terms, and incorporate such provisions and conditions, as they see fit to adopt, and the contract as made measures their rights. . . ."
>
> 32 *Corpus Juris,* 1091, 1092.

Or stated another way:

> ". . . it has been definitely held in this State, as in other jurisdictions, that in cases such as this, involving the right to the proceeds of a life insurance policy, the law of contracts and not the law of inheritance is controlling; that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession; and that the laws of descents and distributions has no applicability to such cases."
>
> *Turner v. Metropolitan Life Insurance Co.,* 56 Cal. App. 2d 862, 865, 133 P. 2d 859 (hearing denied by Supreme Court).

Also, see

> *Heydenfeldt v. Jacobs,* 107 Cal. 373, 40 P. 492;
> *Estate of Welfer,* 110 Cal. App. 2d 262, 265, 242 P. 2d 655.

If the lower Court had followed these applicable California decisions, it would have been compelled to rule that the contingent beneficiary could not take the proceeds because the condition precedent to her taking never occurred. The logical conclusion would be to give the proceeds to the estate as undistributed property.

It should also be noted that if the lower Court chose to disregard the applicable rule of California contract law and give the proceeds to the secondary beneficiary, the executor should have been awarded $5,000.00 of New England Mutual Life Insurance Policy No. 1154064 because it was secondary beneficiary as to that amount. Settlement provision I of that policy provides as follows:

> "A. Five Thousand Dollars ($5,000.00) of the proceeds (or the entire proceeds if less than Five Thousand Dollars) will be paid, immediately upon the decease of the Insured, in one sum of said primary beneficiary, if she shall survive the Insured, otherwise to the executors, administrators or assigns of the Insured." (R 53)

THE LOWER COURT ERRED IN FAILING TO HOLD THAT THE INSURED MADE A GIFT BACK TO THE PRIMARY BENEFICIARY BY NOT CHANGING THE BENEFICIARY CLAUSES OF THE POLICIES.

The lower Court, in its opinion, disregarded the evidence and findings of the Trial Court and applicable California decisions which bears on the issue of whether the insured intended to make a gift back to the primary beneficiary of his insurance policies, by

not changing the beneficiary clauses therein after being notified by the company that this was necessary.

Finding No. XX (R 54) concerns a letter directed to the deceased insured by the insurance company which states, in part, as follows:

> "If you wish to make any changes in the beneficiary arrangement, please advise and forms will be prepared for your signature. . . ."

Finding No. XXI (R 55) states:

> "That subsequent to the date of the aforesaid written communication, George S. Carreiro had transactions with the aforesaid representative of the insurance company wherein his personal presence in the office of said insurance company was required; but at no time did George S. Carreiro request a change of beneficiary of the aforesaid policies, other than by forwarding the aforesaid property settlement agreement to the insurance company, or make any efforts with regard to compliance with the requirements of the aforesaid insurance company in regard to the change of beneficiary procedure."

Finding No. XXII (R 55) states:

> "That upon certain occasions prior to the execution of the aforesaid property settlement agreement, George S. Carreiro had signed change of beneficiary forms incident to obtaining loans concerning said policies."

All of this is now *res judicata.*

It is clear from the foregoing that the deceased assured had ample opportunity to change the bene-

ficiary by executing appropriate forms; that he had, prior to his divorce, executed change of beneficiary forms; that he had certain conversations and transactions with the insurance representatives after the execution of the property settlement agreement; that he had received a letter from the insurance company stating unequivocally that he would be required to sign the change of beneficiary form; and that notwithstanding all of this, he at no time made any effort to change the beneficiaries of the policies.

The cases of *Jenkins v. Jenkins,* 112 Cal. App. 402, 297 P. 56; *Grimm v. Grimm,* 26 Cal. 2d 173, 157 P. 2d 841; *Miller v. Miller,* 94 Cal. App. 2d 785, 211 P. 2d 357; *Shaw v. Board of Administration,* 109 Cal. App. 2d 770, 241 P. 2d 635; *Thorpe v. Randazzo,* 41 Cal. 2d 770, 264 P. 2d 38; support the position of the first wife that notwithstanding a release in a property settlement agreement, the proceeds of the policies are payable to her upon the death of the assured if a beneficiary change has not been executed. The *Thorpe* case states at 774:

> "The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change, but each case must be decided on its own facts."

During the course of the trial, considerable evidence was introduced relating to conversations by or with the decedent, George S. Carreiro. The Court made a finding relative to these conversations as follows:

> "That no creditable evidence was received or believed by the Court with respect to any Conver-

sations by or with decedent George S. Carreiro." (R 56)

This finding would have no bearing on the communications received by the assured from the insurance company or on his conduct or lack of conduct in regard to not changing the beneficiary provisions of the policies. The Court concluded (R 57 and 58) that at the date of his death, George S. Carreiro had manifested a desire to benefit four persons, namely, his first wife, his daughter, his second wife, and his father, and that the evidence was so inconclusive and contradictory that the proceeds should be divided equally among the four parties in this suit.

It is submitted that the lower Court in not even discussing this issue in its opinion neglected the very basis upon which the decision of the Trial Court was made. The findings mentioned above would have been ample for the Trial Court to give the entire proceeds of the policies to the first wife on the theory that he intended to make a gift back to her by failing to change the beneficiary provisions of the policies. Applicable California law *supra* is ample authority.

THE OPINION OF THE LOWER COURT CAUSED A CONFLICT WITHIN THE NINTH CIRCUIT ON THE QUESTION OF LAW INVOLVED IN THIS CASE BECAUSE OF THE DOUBT IT CASTS ON THE EARLIER CASE OF BECK v. DOWNEY, 191 F. 2d 150 AND 198 F. 2d 626.

The *Beck v. Downey* case and the *Beck v. West Coast Life Insurance Co.* case *supra* were identical

cases involving the same primary beneficiary and assured but the Federal and State Courts made conflicting decisions. In the Federal *Beck* case, the alternative beneficiary was the mother of the murderer, and the Court awarded the proceeds to the executor of the assured's estate. In the California *Beck* case, the alternative beneficiary was a friend of the assured and she was awarded the proceeds in preference to the assured's estate. The opinion in the instant case states that "The fact that in *Beck v. Downey* the alternative beneficiary was the mother of the murderer may have greatly influenced the decision of this Court." In the Federal *Beck* case, the Court said, at 191 Fed. 2d 150, 152:

> "The words 'if living' must be interpreted in the ordinary common sense meaning, namely, that the insured intended the proceeds to go to her mother-in-law if the beneficiary were not alive but was dead and buried. Had there been an intent to have the proceeds go to the contingent beneficiary in the event of the incapacity of the beneficiary while alive to take the proceeds, plain language to that effect could and certainly would have been used. We think the language of the policies was clear and unequivocal. Any disability of the beneficiary, such as civil death, assuming it to be applicable to this case, constitutes a sanction or penalty imposed upon the beneficiary, David A. Downey and affected only his rights and privileges."

The lower Court in this case on the last page of their opinion states as follows: "When the insured made the beneficiary his wife and then his daughter

upon the wife's death, what was the importance of the event? It was a mere mark that when she could not take, the daughter should. The event of importance was the inability of the wife to take."

Because of this conflict that we now have within the ninth circuit, the law in this jurisdiction is an unparalleled state of confusion. The Federal *Beck* case says that before the contingent beneficiary can take, the primary beneficiary must be dead and buried. The Carreiro case is to the contrary, and while it does not overrule the *Beck* case, it casts considerable doubt on it. By implication, the Federal *Beck* case tells us that the law of contracts governs the rights of beneficiaries to insurance policies, and the Carreiro case tells us that the law of testamentary disposition governs such rights.

The facts of the instant case make it one of first impression. It will be of national interest because there is no reported case in point in the United States. It involves a question which arises in thousands of divorce cases each year when insurance policies are involved in property settlement agreements. Can the parties to an insurance contract rely on the rights given them within the four corners of the instrument? Or must they guess what some Court may later say the intent was in spite of express language to the contrary?

VII. CONCLUSION.

For the foregoing reasons, the Court should issue a writ of certiorari so that the serious questions involved herein and the conflicts between the decisions in the lower Court and the California Supreme Court may be resolved.

Dated, January 11, 1957.

Respectfully submitted,

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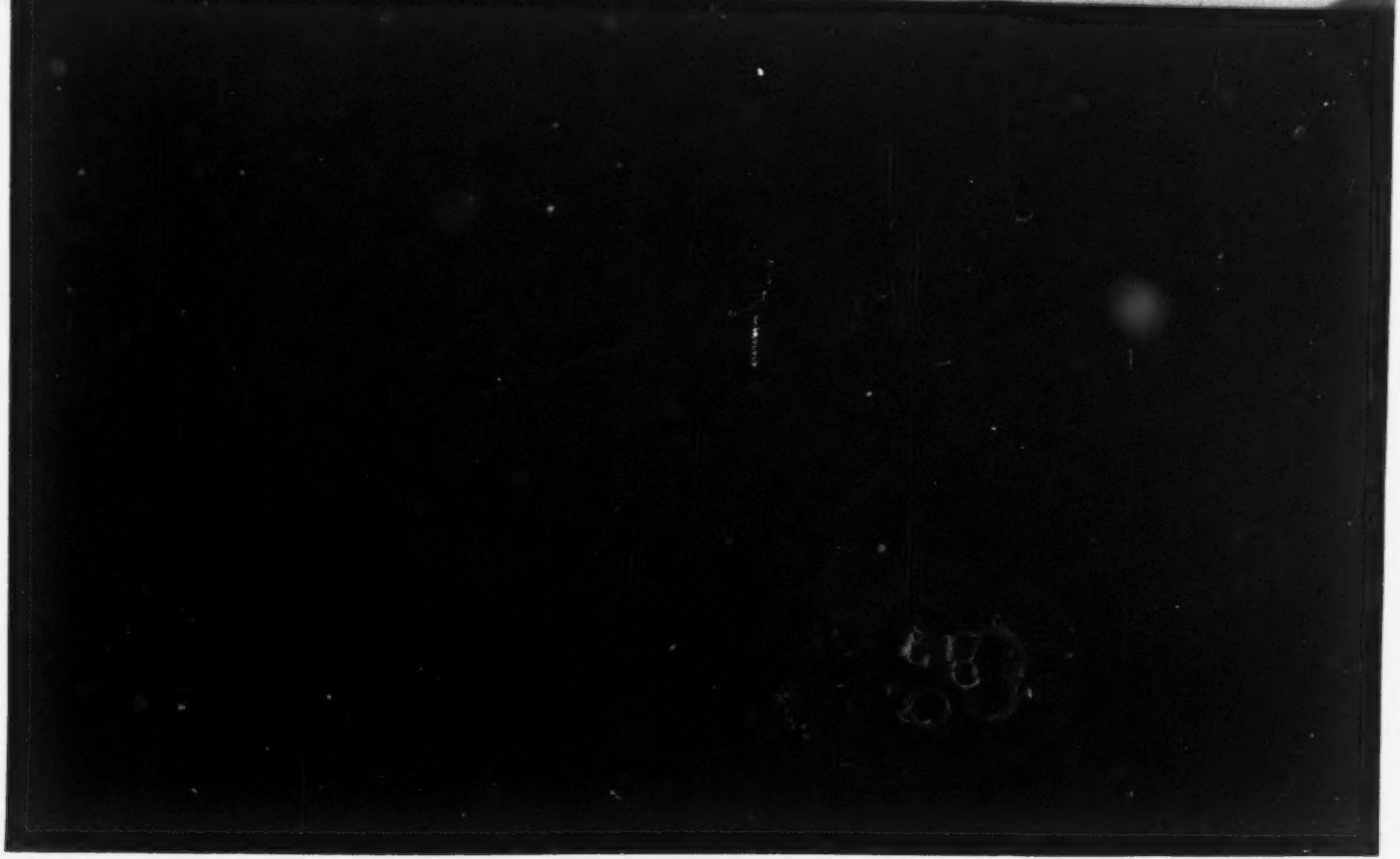
(Appendices A, B and C Follow.)



Appendix A

United States Court of Appeals
for the Ninth Circuit

Phyllis Baekgaard, formerly Phyllis Irene Carreiro, Appellant, vs. Genee M. Carreiro, Irene G. Carreiro, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and Wells Fargo Bank & Union Trust Company, Appellees.	No. 14,750 Oct. 3, 1956

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: Stephens, Bone and Chambers, Circuit Judges.

Stephens, Circuit Judge

This action arose out of conflicting claims to the proceeds of three life insurance policies in the total face amount of $25,000.00 issued by the New England Mutual Life Insurance Company on the life of Dr. George S. Carreiro, deceased, a resident of California at the time of death. The action was filed by New England Mutual Life Insurance Company, a Massa-

chusetts corporation, as an action in interpleader under Section 1335 of Title 28 United States Code. The issue in the case is how shall the insurance benefits be awarded as to three women and as to the assured's estate; Genee M. Carreiro, the first and divorced wife of the assured (a citizen of California); Irene G. Carreiro, his second wife (a citizen of California) and Phyllis Baekgaard, assured's daughter (a citizen of Illinois). These three were named as defendants and the proceeds from the policies were deposited in court. Wells Fargo Bank & Union Trust Company (a California corporation) intervened as the executor of the Last Will and Testament of the assured.[1]

Dr. Carreiro and Genee M. Carreiro were married in 1927 and *Phyllis* Irene Carreiro, now known as *Phyllis* Baekgaard was the sole issue.

The trial court adjudged a division of the policy proceeds among the claimants as an equitable solution of the problem and *Phyllis* Irene Carreiro, the daughter appealed. The insurance policy issued during the coverture of the doctor and *Genee* M. Carreiro with *Genee,* the wife, as primary beneficiary and *Phyllis* as the secondary beneficiary in the event that *Genee* predeceased Dr. Carreiro. If both primary and secondary beneficiaries predeceased Dr. Carreiro, the proceeds were to be payable to the Executor of his

[1]Another policy having a face benefit of $5,000.00 with Prudential Life Insurance Company of America was the subject of a separate action which is now on appeal before this court (No. 14,878) but in which further proceedings have been stayed pending determination of this appeal.

Will. In August, 1951, the doctor and *Genee* entered into a written property settlement. We have set out in part the text of the agreement in Note 2.[2]

An interlocutory decree of divorce was adjudged between the doctor and *Genee* and the final decree was adjudged the following August. The doctor and *Irene* Carreiro were married in December of 1952. Dr. Carreiro died January, 1954. The insurance policies in suit were in good standing and they were spe-

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[2]The text of the settlement—in part—is as follows:

"Whereas, the parties hereto are minded to forever adjust and settle any and all community property rights, property rights, rights to support or maintenance, and other matters between them;

"Now, therefore, it is agreed that in consideration of the mutual promises, agreements and covenants contained herein, it is covenanted, agreed and promised by each party hereto, to and with the other party hereto, as follows:

* * *

"Fourth: That said parties hereto each hereby waive any and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and each of the said parties hereby waive any and all right of homestead in the real property of the other, probate or otherwise, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and from the date of this agreement to the end of the world said waiver of the other in the estate of the other party shall from the date of this agreement be effective and they shall have all the rights of single persons and maintain the same relation of such toward each other.

"Fifth: The husband and wife shall accept the provisions herein made for each of them in full satisfaction of the right of either to the community property or alleged separate property of either of them.

"Sixth: The property of the parties hereto shall be divided by said parties as follows:

cifically mentioned in the property settlement between the assured and *Genee,* the first wife.

The trial judge expressed his disbelief in respect of testimony of conversations with Dr. Carreiro re-

---

1. The wife shall receive and be entitled to all that real property situated in the City and County of San Francisco, State of California, described as follows:

(described)

* * *

* * *

7. The husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claims of the wife thereto.

Policy No. 820167 in the sum of $10,000, New England Mutual Life Insurance Company.

Policy No. 842502 in the sum of $15,000.00, New England Mutual Life Insurance Company.

Policy No. 725936 in the sum of $5,000.00, New England Mutual Life Insurance Company.

Policy No. 725937 in the sum of $5,000.00, New England Mutual Life Insurance Company.

Policy No. 5243932 in the sum of $5,000.00, Prudential Insurance Company of America.

Policy No. 1153064 in the sum of $15,000.00, New England Mutual Life Insurance Company.

"Seventh: The parties shall, at any time or times hereafter, make, execute and deliver any and all, such further or other instruments, papers, or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions and agreements hereof.

* * *

"Ninth: That each of said parties fully and clearly understands each and every of the provisions herein contained, and the legal import and results thereof, and of the whole thereof, and that each of the parties has read this agreement in full and executes the same freely and voluntarily, and not under duress, menace, fraud or undue influence, coercion or intimidation of the other party, or of any other person or persons whatsoever, and that in any action between the parties now pending or hereafter to be commenced, that this agreement shall be offered in evidence for the approval of the court, and shall be the measure of their respective rights, and that the provisions hereof shall be incorporated in the, or any, decree therein rendered, such order containing a recital that it is predicated upon the terms of this agreement and not upon statutory authority."

lating to the latter's intentions as to the beneficiary of the policies in suit and held that the evidence before the court was inconclusive and contradictory and ordered the proceeds of the policies to be equally divided between the three women claimants and the bank as Executor.

Appellant argues that she is entitled to the entire proceeds since the primary beneficiary, *Genee* Carreiro, as a legal result of the property settlement agreement waived any expectancies in the policies, and thus she, *Phyllis,* as named secondary beneficiary became entitled to the proceeds of the policies in suit. In order to answer this contention, it is necessary to resolve the following questions:

(1) Did the primary beneficiary, *Genee* Carreiro, waive or relinquish her expectancy as a beneficiary under the policies by virtue of the property settlement agreement entered into with the deceased?

(2) If *Genee* Carreiro did so waive or relinquish such expectancy, does that fact have the legal effect of placing the secondary beneficiary in a position to take the proceeds even though the primary beneficiary is still living, or does it mean that the proceeds go into the assured's estate?

(3) In determining the legal effect of a waiver of expectancies under the facts of this case, the law of what jurisdiction is controlling?

LEGAL EFFECT OF THE PROPERTY SETTLEMENT

The position of a beneficiary in an insurance policy subject to change by the insured is similar to that of a beneficiary of a Will, a mere expectancy dependent on designation at the time of the insured's death. *Grimm v. Grimm,* 26 Cal. 2d 173, 176, 157 P. 2d 841. Where a property settlement agreement covers *all* of the property of the parties, and the wife, in accepting certain provisions for her benefit, fully releases the husband with respect to all other property, such release ordinarily would cover and include her interest as the designated beneficiary on an insurance policy; but where the language is not broad enough to encompass such an expectancy or an intent appears to exclude such rights as a present part of the settlement, the wife may still take as a beneficiary if the policy so provides. *Thorp v. Randazzo,* 41 Cal. 2d 770, 264 Pac. 2d 38, 40; *Miller v. Miller,* 94 Cal. App. 2d 785, 789, 211 P. 2d 357. For cases construing various property settlement agreements see: *Thorp v. Randazzo,* 264 P. 2d 38, 41 Cal. 2d 770; *Grimm v. Grimm,* 26 Cal. 2d 173, 157 P. 2d 841; *Meherin v. Meherin,* 99 Cal. App. 2d 596, 222 P. 2d 305; *Prudential Insurance Co. of America v. Quay,* 115 F. Supp. 63; *United Benefit Life Insurance Company v. Price,* Wash., 283 P. 2d 119; *In re Buchman's Estate,* 281 P. 2d 608.

It is evident, that in our case, the trial judge construed the property settlement agreement as effecting a relinquishment or waiver of any expectancies

that *Genee* Carreiro had or may have had in the future in the policies. Conclusion of Law I is in part:

> "Pursuant to the terms and provisions of the aforesaid policies and the terms and provisions of the property settlement agreement executed by and between Genee M. Carreiro and said George S. Carreiro as supplemented by events subsequent thereto, the proceeds of all policies were payable to neither Genee Mignon Carreiro, the designated beneficiary, nor to Phyllis Baekgaard, the secondary beneficiary. * * *"

Since *Genee* Carreiro was living at the time of George S. Carreiro's death and she was of record as the primary beneficiary of the policies in suit, it is clear that the trial judge could only refuse to award the proceeds to her if she had originally waived her expectancies under the policies unless there was convincing evidence that showed a different intent. It would appear that *Genee* Carreiro does not claim that she did not by the agreement waive her expectancies under the policies, but now claims the proceeds were later given to her, since in her "Answer to Pleading in Intervention" in paragraph II she states:

> "* * *
>
> "Said answering defendant and cross-complainant avers that at no time *since* receipt of notice of the *gift* of said insurance policies by the assured has she waived any rights to receive the proceeds therefrom." (Emphasis supplied)

Whether *Genee* did so concede or did not, if she had affirmatively shown that such was the intent of the

insured, it would have been the duty of the trial judge to award the proceeds to her. But the trial judge specifically stated that he was unable to ascertain what was the deceased's intent because, as the trial judge held, of the inconclusive and conflicting evidence and, therefore, the resort to what amounted to a compromise judicial adjustment of the issue. In this posture of the case, it was *Genee's* burden to convince the court that Dr. Carreiro intended that she should receive the insurance proceeds. She did not meet this burden!

We agree with the trial judge that *Genee* Carreiro by the property settlement waived and relinquished all right to the insurance proceeds. The policies were specifically listed and described and obviously were one of the bargaining elements between *Genee* Carreiro and Dr. Carreiro as to a division of their property. We note also that other things were "waived" under the agreement such as the right of each to take by Will from the other or to share in the other's estate, or to act as executor or executrix or administrator or administratrix. These provisions were held to be important considerations in interpreting the agreement in *Meherin v. Meherin,* supra, and *Thorp v. Randazzo,* supra. It was stated in the agreement that the husband was to receive the policies "free and clear of *any claims* of the wife thereto". (Emphasis supplied.) The only possible defect in the agreement was the failure to expand the meaning of "any claims" to include an "expectancy" under an insurance policy. But a disposition of *all* property rights

and "other matters" was clearly contemplated by the parties. As was said in *Meherin v. Meherin,* 222 P. 2d at page 306:

> "The property settlement agreement was quite comprehensive and clearly established that a complete and final settlement was intended."

In our case not only was there made mention of community property rights, but also of "property rights" and "rights to support and maintenance" and "other matters between them". The fact that there was a named secondary beneficiary is not in itself controlling, but we think that it is an element worthy of consideration in determining what was the intent of the parties to the agreement when it was executed. Here it can be argued that the deceased did not intend to give up valuable property to his wife as he did do and in addition to create a strong possibility that his divorced wife would also get the proceeds of the policies to the exclusion of his own daughter. Thus, it is certain that the court did not specifically decide the issue as to whether or not it was the insured's intention that *Genee* should take the proceeds of the insurance notwithstanding her waiver and relinquishment of any right to do so by the terms of the property settlement agreement. However, it is implicit in his decision and judgment that he disbelieved the evidence as to the claim of *Genee* that he gave her the right to the proceeds subsequent to the date of the property settlement. It seems, therefore, that *Genee* was not in a position to receive any part of the proceeds.

It can be argued from the fact that the doctor sent a copy of the agreement to the company that he wanted to inform the company that a change in beneficiary had been accomplished. It was not necessary for him to send the agreement to the company in order to divest his first wife of her community property interest. That divestment was complete when the agreement was executed and incorporated into the divorce decree. We hold that at the time of the execution of the agreement there was a waiver by *Genee* Carreiro of any and all interests in the policies.

EFFECT OF WAIVER ON SECONDARY BENEFICIARY

In summation to this point: *Genee,* the primary beneficiary is out of the issue. *Phyllis,* the daughter and secondary beneficiary, bases her claim to all of the insurance proceeds upon the contention that she succeeds to the vacancy and in effect becomes the primary beneficiary. The trial court's view as to such a claim is adverse and states:

> "The condition precedent to the payment of the proceeds to Phyllis Baekgaard * * * to wit, the death of the primary beneficiary, not having been fulfilled as of the death of the assured, said secondary beneficiary is not entitled to the proceeds of the aforesaid policies."

In this we think the trial judge read the policies with too much of an eye on the strictly literal wording and in our opinion the Supreme Court of California supports us. That California law rules this case is not

doubtful and we treat that jurisdictional question in the margin.[3]

CALIFORNIA LAW

In *Beck v. West Coast Life Insurance Co.*,[4] 38 Cal. 2d 643, 241 P. 2d 544, 26 A.L.R. 2d 979, the Supreme

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[3]The insurance policies were issued by a Massachusetts corporation and the benefits or face amounts were payable at Boston, Massachusetts. The policies provided that premiums were payable either "at the Home Office, or they may be paid to an agent of the Company • • •". Apparently two of the policies were applied for and delivered in Honolulu, Hawaii, in 1932, and the other policy was applied for and delivered in California in 1942 after Dr. Carreiro had moved to San Francisco. Premiums were paid on all three policies to an agent of the company in San Francisco for a number of years, and the policies were also serviced at the San Francisco office of the company.

Section 1646 of the Civil Code of California provides that "A contract is to be interpreted according to the law and usage of the place where it is to be performed • • •". Appellees argue that the place of performance is Boston, Massachusetts, the place where the face amount of the policy is to be made, and therefore, California law is inapplicable. Appellant argues that under the facts of this case performance was in part at least in California and therefore, California law is applicable. We agree with appellant. This Court held in *Ostroff v. New York Life Ins. Co.*, 104 F. 2d 986, that California law was applicable where "in the ordinary course the repeated payments of premiums, constituting by far the greater number of performances of its terms, are to be performed in California." In that case the benefits of an insurance policy were payable in New York, but premiums were payable "at the Home Office of the Company or to an authorized agent of the Company • • •". For California cases in accord, see: *Braun v. New York Life Ins. Co.*, 115 P. 2d 880, 46 Cal. App. 2d 335; *Blair v. New York Life Ins. Co.*, 40 Cal. App. 2d 494, 104 P. 2d 1075. See also: *New York Life Insurance Co. v. Waterman*, 104 F. 2d 990.

Our case is similar to the *Ostroff* case. In addition, one policy was delivered in California and all policies were being serviced in California for a number of years. We hold California law to be controlling and binding on this and the District Court.

[4]See also: *Neff v. Massachusetts Mut. Life Ins. Co.*, Ohio, 1952, 107 NE 2, 100, and *Manufacturer's Life Ins. Co. v. Moore*, D. C. Calif., 1953, 116 F. Supp. 171.

Court of California held that where a life policy stated that the proceeds should be payable to a secondary beneficiary if the primary beneficiary predeceased the insured, the insured clearly indicated her desire and intent that any interest her estate might have in the proceeds should be subordinate to the interest of the secondary or alternative beneficiary, and hence where the primary beneficiary murdered the insured and was precluded from receiving the proceeds under the public policy of the State of California, the secondary or alternative beneficiary was entitled to the proceeds as against the insured's estate. We think the California Supreme Court's reasoning is applicable to our case. We quote from the cited case, page 546:

> "Because the beneficiary clause of a life insurance policy in which the insured has reserved the right to change beneficiaries is donative and testamentary in character, (citing cases) the intent of the insured as expressed by the language that she used should be given effect so far as possible. * * * Although her expressed intent that her husband receive the proceeds cannot be given effect, the policy names the one she wished to take if her husband could not. It stated that the proceeds should be paid to the alternative beneficiary, if the primary beneficiary predeceased the insured. Thus, in the type of disability that would naturally be anticipated by the insured, the alternative beneficiary was preferred over the estate of the insured. In this case there occurred the only other possible contingency in which the primary beneficiary would be under a disability equivalent

to actual death. The insured has clearly indicated her intent that any interest her estate might have in the proceeds of the policy should be subordinate to the interest of the alternative beneficiary. This intent is recognized by a holding that the alternative beneficiary may recover the proceeds * * *."

In the recent case of *Carter v. Carter,* Florida, 88 So. 2d 153, June 8, 1956, the insured was allegedly killed by his wife who was the primary beneficiary, and one of the questions for determination was whether a contingent beneficiary should receive the proceeds of the life policy or the insured's estate, if it be found that the wife unlawfully and intentionally killed the husband. The Florida Supreme Court expressly referred to and approved the California case of *Beck v. West Coast Life Ins. Co.,* supra, 38 Cal. 2d 643, 241 P. 2d 544, 26 A.L.R. 2d 979, and in so doing made the following comments (page 160):

"We must assume that the word beneficiary as used in a life insurance policy comprehends beneficiary in its broadest legal aspect and in that sense it necessarily must be considered as having reference to the survival of a *beneficiary eligible to take.* * * *" (Emphasis supplied)

* * *

"We prefer to adhere to what we consider to be the better rule which is the one that appears to give effect to the intent of the insured by paying the proceeds to the beneficiary first in priority *who is eligible under the law to receive the money.* In this case it would be the respondent. * * *" (Contingent beneficiary) (Emphasis supplied)

In our case the policies additionally show such an intent as they stated that if primary and secondary beneficiaries predeceased the insured, *then* the proceeds should go to the estate! But see: *Beck v. Downey,* 9 Cir. 191 F. 2d 150 and 198 F. 2d 626. In that case we noted that California law was *not* controlling after the Supreme Court of the United States had remanded the case to this court for a reconsideration in light of the California case of *Beck v. West Coast Life Insurance Co.,* supra. California law was held not to be controlling as the insurance policy in issue there was neither made, executed, delivered nor to be performed in California. No premiums had been paid in California. That is not the case that we now have before us. We are, therefore, bound to decide this case in light of the California Supreme Court decision. We think the California court would reach the same result that was reached in *Beck v. West Coast Life Ins. Co.,* supra, and award the proceeds to the alternative or secondary beneficiary, Phyllis Baekgaard.

We note that the decision of this court in *Beck v. Downey* is distinguishable from the California case in one decisive respect and that is that in the prior case before this court the secondary beneficiary was the mother of the murderer, while in the California case the secondary beneficiary was merely a friend of the murdered wife. The fact that in *Beck v. Downey,* the alternative beneficiary was the mother of the murderer may have greatly influenced the decision of

this court. This is evident as shown by the concurring opinion of Judge Fee in the case. (198 F. 2d 626).

When the insured made the beneficiary his wife and then the daughter upon the wife's death, what was the importance of the "death" event? It was a mere mark that when she could not take, the daughter should. *The event of importance was the inability of the wife to take.* That that event was brought about earlier and by agreement of the parties should and does leave the secondary beneficiary the prime one.

We hold that the entire proceeds of the policies should go to *Phyllis* Baekgaard, the daughter of the deceased.

Judgment reversed with instructions to proceed in accordance with this opinion.

(Endorsed:) Opinion. Filed, Oct. 3, 1956.

Reversed and remanded.

Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday,
December 8, 1956

Before: Stephens, Bone and Chambers, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellees, filed November 26, 1956, and within time allowed by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

Appendix C

United States Court of Appeals
for the Ninth Circuit

Phyllis Backgaard, formerly Phyllis Irene Carreiro, Appellant, vs. Genee M. Carreiro, Irene G. Carreiro, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and Wells Fargo Bank & Union Trust Company, Appellees.	No. 14,750

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant, and against the Appellees, and that this cause be, and

hereby is remanded to the said District Court with instructions to proceed in accordance with the opinion of this Court.

It Is Further Ordered and adjudged by this Court, that the Appellant recover against the Appellee for her costs herein expended and have execution therefor.

(Endorsed:) Judgment

Filed and Entered: October 3, 1956

Paul P. O'Brien, Clerk.